



State of Rhode Island and Providence Plantations

DEPARTMENT OF ATTORNEY GENERAL

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

May 21, 2015
OM 15-08
PR 15-20

Mark McBurney, Esquire

Re: Higgins v. Lonsdale Fire District

Dear Mr. McBurney:

The investigation into the Open Meetings Act (“OMA”) and Access to Public Records Act (“APRA”) complaint filed against the Lonsdale Fire District (“Fire District”), on behalf of your client Ms. Sharon Higgins, is complete. We shall address your allegations, the Fire District’s response, and this Department’s findings in seriatim.

At the outset, we note that in examining whether a violation of the OMA or the APRA has occurred, we are mindful that our mandate is not to substitute this Department’s independent judgment concerning whether an infraction has occurred, but instead, to interpret and enforce the OMA and the APRA as the General Assembly has written this law and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the Fire District violated the OMA or the APRA. See R.I. Gen. Laws §§ 38-2-8; 42-46-8. In other words, we do not write on a blank slate.

On April 3, 2014, you made an APRA request to the Fire District on behalf of Ms. Higgins, seeking, in relevant part:

“segregable portions of [John Doe’s]¹ employment application(s) and all his employment contract(s), indicating, at minimum, the date of the document and his town/city of residence (from 1/1/04 to [April 3, 2014];”

¹ We decline to name this person as identification does nothing to elucidate the issues presented in this finding.

“segregable portions of all documents contained in his personnel file which reference his town/city of residence, indicating, at minimum, the date of the document and his town/city of residence;”

“segregable portions of all other documents which indicate [John Doe’s] town/city of residence, indicating, at minimum, the date of the document and his town/city of residence;” and

“[John Doe’s] work schedule from 1/1/2013 to [April 3, 2014].” (Emphases in original).

By letter dated April 21, 2014, the Fire District responded to your April 3, 2014 APRA request, in relevant part:

“I have had an opportunity to review Rhode Island General Laws §38-2-2. It would appear that the only records which you and your client are entitled to under that statute is set forth in paragraph 4 of your request, ‘[John Doe’s] work schedule from January 1, 2013 to today’s date.’ I have attached a copy of those records with this letter.”

Based on the foregoing, you allege the Fire District violated the APRA when it responded to your April 3, 2014 APRA request in an untimely manner and when it failed to identify the specific reasons for denying certain aspects of your request.

The APRA states that, unless exempt, all records maintained by any public body shall be public records and every person shall have the right to inspect and/or copy such records. See R.I. Gen. Laws § 38-2-3(a). To effectuate this mandate, the APRA provides procedural requirements governing the time and means by which a request for records is to be processed. A public body has ten (10) business days to respond in some capacity to a records request, whether by producing responsive documents, denying the request with reason(s), or extending the time period necessary to comply. See R.I. Gen. Laws § 38-2-7. If the public body denies the request, a written response detailing the specific reasons for the denial shall be sent within ten (10) business days to the person or entity making the request. See R.I. Gen. Laws § 38-2-7(a). If no response is sent within ten (10) business days, the lack of response will be deemed a denial. See R.I. Gen. Laws § 38-2-7(b). “Except for good cause shown, any reason not specifically set forth in the denial shall be deemed waived by the public body.” R.I. Gen. Laws § 38-2-7(a).

Here, we find the Fire District violated the APRA. In particular, the Fire District, through its legal counsel, Dennis S. Baluch, Esquire, acknowledges that the Fire District responded to your April 3, 2014 APRA request by letter dated April 21, 2014, and that such a response was untimely. See R.I. Gen. Laws § 38-2-7. Because the Fire District violated the APRA when it failed to timely respond to your request, and because your request was deemed denied as a matter of law, see R.I. Gen. Laws § 38-2-7(b), it is unnecessary for us to examine whether the Fire District further violated the APRA through its April 21, 2014 response.

Subsequently, on April 24, 2014, you made another APRA request on behalf of your client, Ms. Higgins, seeking:

- “1. all RIGL 38-2-3.16 compliance documents that were filed before receipt of this request.
2. [John Doe’s] work schedule, showing hours and days worked, from 1/1/2012 to today.
3. segregable portions of all [John Doe’s] W-2 and/or 1099 forms, showing his address only, from 1/1/08 until today.”

By email dated April 29, 2014, the Fire District responded, in relevant part:

“I have reviewed the provisions of 38-2-3.16 again. I believe that the fire district complied with the statute when I mailed you our letter which was sent out on 4/22.”²

Based on the foregoing, you allege the Fire District violated the APRA when it responded to your April 24, 2014 APRA request by failing to provide any responsive documents and by failing to identify the specific reasons for denying your request. With respect to this allegation, Mr. Baluch relates that he is “not aware of any documents pursuant to R.I.G.L. § 38-2-3.16 that were filed by the Lonsdale Fire District prior to April 24, 2014.” This Department’s review of APRA certifications submitted to this Department supports this representation.

Our review of the Fire District’s April 29, 2014 response finds that the Fire District failed to state the “specific reasons for the denial.” R.I. Gen. Laws § 38-2-7(a). With respect to your argument that the Fire District failed to provide the documents you sought, as noted supra, the Fire District does not maintain copies of the APRA certification required by R.I. Gen. Laws § 38-2-3.16. Therefore, the Fire District did not violate the APRA when it did not provide these documents. R.I. Gen. Laws § 38-2-3(h). Additionally, you sought segregable portions of John Doe’s 1099 and/or W2 forms. While we question whether the Fire District actually maintains copies of the W2 and 1099 forms for John Doe, the resolution of this issue is of little moment because even if these documents are maintained by the Fire District, the disclosure of these documents, even in the redacted manner sought, would violate federal law. See 28 U.S.C. § 6103(a)(general rule is that “[r]eturns and return information shall be confidential”). See also 28 U.S.C. § 6103(b)(2)(defining “return information” as, inter alia, “other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return”); R.I. Gen. Laws § 38-2-2(4)(O)(exempting “[a]ll tax returns”); Office of the Budget v. Campbell, 25 A.3d 1318, 1319 (Pa. Comm. 2011)(“the W-2 forms fall within the definitions of ‘return’ and ‘return information’; as such, they are confidential and cannot be disclosed.”). Accordingly, the non-disclosure of these documents did not violate the APRA.³

² It appears that this is reference to the Fire District’s April 21, 2014 letter.

³ We acknowledge that the Fire District did not specifically exempt John Doe’s W-2 and 1099 forms, but we find “good cause” to apply the exemptions discussed above. See R.I. Gen. Laws §

With respect to your request for the work-schedule, we have been provided no evidence that the Fire District provided documents responsive to your April 24, 2014 APRA request for John Doe's schedule, showing hours and days worked, from January 1, 2012 to April 24, 2014, nor have we been presented (or discern) any evidence that the Fire District articulated "the specific reasons for the denial." R.I. Gen. Laws § 38-2-7(a). As such, the failure to provide (or properly deny) access to the work schedule violated the APRA. See R.I. Gen. Laws § 38-2-7(a).

Lastly, by email dated May 9, 2014, you made an APRA request to the Fire District, on behalf of Ms. Higgins, seeking, in relevant part, the "portion of the [Fire District's] 'closed' and/or 'sealed' minutes from its 4/16/14 meeting which concerns and/or mentions, in any way, [John Doe] and/or my allegations[.]" On May 16, 2014, the Fire District responded and in relevant part indicated that "[a]s to sealed minutes of the 4/16 meeting, I believe they are privileged under the statute." You contend that the Fire District's denial failed to provide the specific reasons for the denial. See R.I. Gen. Laws § 38-2-7(a). While Mr. Baluch contends that in his May 16, 2014 response, he was "relying on §38-2-2, Subsection (4)(a) and (b) as well as the attorney/client privilege," there is no question that the Fire District's May 16, 2014 denial failed to articulate "the specific reasons for the denial." See R.I. Gen. Laws § 38-2-7(a); Costantino v. Smithfield School Committee, PR 13-24.

You also contend that the Fire District violated the OMA during its April 16, 2014 meeting when the Fire District convened into executive session without stating the reason for holding a closed meeting by citation to a subdivision of R.I. Gen. Laws § 42-46-5(a) and by failing to state the nature of the business to be discussed during the closed session.

Rhode Island General Laws § 42-46-4(a) provides, in relevant part:

"[b]y open call, a public body may hold a meeting closed to the public upon an affirmative vote of the majority of its members. A meeting closed to the public shall be limited to matters allowed to be exempted from discussion at open meetings by § 42-46-5. The vote of each member on the question of holding a meeting closed to the public and the reason for holding a closed meeting, by a citation to a subdivision of § 42-46-5(a), and a statement specifying the nature of the business to be discussed, shall be recorded and entered into the minutes of the meeting."

In response to this allegation, Mr. Baluch relates that "§ 42-46-5(4) clearly permits a confidential discussion for any investigative proceedings regarding allegations of misconduct either civil or criminal. The discussions set forth in the Executive Session on April 16, 2014 regarding [John Doe] certainly are protected by § 42-[4]6-5(4)."

38-2-7(a). As discussed, supra, disclosure would violate federal law and there is no evidence that John Doe was responsible for denying the APRA request you made to the Fire District. See e.g., Scripps News v. Department of Business Regulation, PR 14-07.

While we have no occasion to doubt that the subject-matter of the April 16, 2014 executive session involving John Doe was appropriate for executive session – nor do you allege that the subject-matter was inappropriate – our review of the April 16, 2014 open session minutes finds that the Fire District failed to memorialize the open call as required by R.I. Gen. Laws § 42-46-4(a). In particular, although it appears that the Fire District may have provided a “statement specifying the nature of the business to be discussed,” i.e., “personnel issues,” in accordance with Graziano v. Rhode Island Lottery Commission, OM 99-06, there is no question that the Fire District failed to articulate the subdivision of R.I. Gen. Laws § 42-46-5(a) upon which the executive session was convened. Instead, the Fire District’s April 16, 2014 open session minutes relate that the executive session was convened pursuant to R.I. Gen. Laws § 42-46-5(a)(1)-(9). This violated the OMA.

Upon a finding of an APRA violation, the Attorney General may file a complaint in Superior Court on behalf of the Complainant, requesting “injunctive or declaratory relief.” See R.I. Gen. Laws § 38-2-8(b). A court “shall impose a civil fine not exceeding two thousand dollars (\$2,000) against a public body...found to have committed a knowing and willful violation of this chapter, and a civil fine not to exceed one thousand dollars (\$1,000) against a public body found to have recklessly violated this chapter***.” See R.I. Gen. Laws § 38-2-9(d). Civil penalties are also authorized under the OMA for a “willful or knowing” violation not exceeding five thousand (\$5,000) dollars. See R.I. Gen. Laws § 42-46-8.

Here, we find insufficient evidence of a willful or knowing violation, or a reckless violation. We do, however, conclude that injunctive relief would be appropriate, but deem it prudent to allow the Fire District the opportunity to remedy the instant violations on its own. In particular, we conclude that the Fire District should respond to your April 3, 2014 APRA request and provide the documents responsive to categories one through three in a manner consistent with this finding. See R.I. Gen. Laws § 38-2-7(a) (“Except for good cause shown, any reason not specifically set forth in the denial shall be deemed waived by the public body.”). We note that categories one through three are limited to documents that would contain the date and town/city of residence for John Doe. While the Fire District claims that this information is protected by the attorney/client privilege and/or privacy rights, the assertion of this privilege without identification of the context and type of documents is too broad for our determination on this point. We do observe, however, that R.I. Gen. Laws § 38-2-2(4)(A)(I)(b) requires the “city or town of residence” to be made public and we have been provided no evidence that this case falls within the parameters of Chappell v. Department of Public Safety, PR 14-03, or any other exception. Should the Fire District deem that the specific information you seek, i.e., the date of the document and the town/city of residence for John Doe, is exempt from public disclosure, we are confident that the Fire District can provide the “specific reasons for the denial” in accordance with the APRA. We arrive at a similar conclusion with respect to your April 24, 2014 APRA request, category two, which sought John Doe’s “work schedule, showing hours and days worked, from 1/1/2012 to today.” The Fire District may not charge for its review and production, if any, concerning these two (2) requests. See R.I. Gen. Laws § 38-2-7(b). Although the Fire District failed to provide the “specific reasons” for denying you the April 16, 2014 executive session minutes, we observe that no argument or evidence has been presented that the substance of this discussion was inappropriate for executive session and we likewise deem that disclosure of these executive session minutes falls within Scripps News, PR 14-07 for the reasons discussed, supra. For this reason, the Fire District need not publicly disclose the

April 16, 2014 executive session minutes. The Fire District must respond to these outstanding matters in a timeframe and manner consistent with the APRA.

Nothing within the APRA or the OMA prohibits an individual or entity from obtaining legal counsel for the purpose of instituting injunctive or declaratory relief in Superior Court. See R.I. Gen. Laws §§ 42-46-8; 38-2-8(b). With respect to the OMA violation, the complainant may do so within ninety (90) days from the date of the Attorney General's closing of the complaint or within one hundred eighty (180) days of the alleged violation, whichever occurs later. R.I. Gen. Laws § 42-46-8. The Fire District should be advised that the actions discussed herein violate the APRA and the OMA, and this finding may serve as evidence of a willful and knowing, or reckless, violation in similar future circumstances. Please be advised that we are closing this file as of the date of this letter, although we reserve the right to reopen this matter should the Fire District fail to remedy these violations as discussed herein.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael W. Field", written in a cursive style.

Michael W. Field
Assistant Attorney General

Cc: Dennis Baluch, Esquire